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Paper No. 16

Dr. Yash P. Sharma
Medicine and Applied Sciences, Inc.
1420 Spring Hill Road
Suite 600
McLean, VA 22102

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MAY 03 2004

OFFICE OF PETITIONS

In re Application of :
Yash Sharma :
Application No. 09/474,677 :
Filed: December 9, 1999 :
Attorney Docket No. 35284-03200 10599- :
004001)

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed June 23, 2003, to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed;¹ (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition lacks item (3).

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

A "Notice to Comply With the Sequence Rules" (Notice) was mailed to applicant on November 1, 2002, setting a one (1) month or thirty (30) day shortened statutory period, whichever was longer, within which to submit a reply. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Therefore, the application became abandoned on December 2, 2002.

The showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 35 U.S.C. § 151 and 37 CFR 1.137(a).

Petitioner asserts that the Notice was never received; however, no evidence has been presented to support such an assertion. Petitioner has provided a copy of a series of e-mail correspondence between him and his previous attorney. While it is conveyed in the messages that the Notice was not received, the previous attorney also states, "...there were many communications from the USPTO that we never received because you called the Examiner directly and bypassed Milbank." This suggests that the Notice could have been received by petitioner, but was somehow misplaced. A review of USPTO records does not show any irregularity in the mailing of the Notice. Therefore, it can be assumed that the Notice was properly mailed and was lost after receipt by petitioner or petitioner's representative.

The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. However, the showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions). See MPEP 711.03(c). In view of the above, petitioner must provide documentation to support the allegation that the Notice was not received, in order to establish unavoidable delay.

Petitioner should consider filing a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$665 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b). A blank petition under 37 CFR 1.137(b) form is enclosed for petitioner's use.

Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
 Post Office Box 1450
 Alexandria, VA 22313-1450

Effective December 1, 2003, the Office of Petitions can no longer receive hand-carried correspondence, or facsimile transmissions of correspondence. The centralized location for hand-carried correspondence is the Customer Window located at:

2011 South Clark Place
Crystal Plaza Two Lobby
Room 1B03
Arlington, VA 22202

The centralized facsimile number is **(703) 872-9306**.

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 306-3475.



Marianne E. Morgan
Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Examination Policy

Enclosure: Blank Petition Under 37 CFR 1.137(b) Form